Electronically Filed
Docket: 16-CRB-0003-PR (2018-2022) (Remand)
Filing Date: 02/24/2022 11:29:13 PM EST

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.

In re **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords III)**	**Docket No. 16–CRB–0003–PR (2018–2022) (Remand)**

SERVICES' JOINT REBUTTAL BRIEF ADDRESSING THE JUDGES' WORKING PROPOSAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

The Services have given the Judges the best evidence from the record to use as the "total royalty" input in the Working Proposal's rate-setting formula and explained why that input is superior to other potential options. When that input is used, the Working Proposal—absent further adjustment—yields an all-in musical works rate of [redacted]%. The Services, however, identified flaws with the Working Proposal and offered concrete adjustments to alleviate them. Appropriately adjusted, the Working Proposal yields a rate level that is similar to the percentage-of-revenue rate prong in the *Phonorecords II* settlement. Using the *Phonorecords II* settlement as a benchmark for rate-setting both confirms the propriety of the proposed adjustments to the Working Proposal and offers a straightforward way of generating a result that satisfies all four statutory factors in Section 801(b)(1).

In sharp contrast, the Copyright Owners chose instead to rehash arguments that the Judges have already rejected: that the D.C. Circuit in *Johnson v. Copyright Royalty Board* "affirmed" the 15.1% rate that it actually vacated; that the Judges are required to reinstate that rate; and that the flaws in the Working Proposal can only be rectified with changes that make it the same model the Majority used to reach the vacated rate. The Copyright Owners also continue to argue that there is rampant revenue diminution and deferment that can only be addressed with an uncapped TCC prong. The Judges already correctly found these arguments to be "meritless" and "inconsistent with *Johnson*." Order Granting in Part and Den. in Part Copyright Owners' Mot. for Recons. or Clarification at 3, 4 n.7, eCRB Doc. No. 26007 (Jan. 6, 2022) (Jan. 6 Order). Nothing the Copyright Owners say calls that into question. The Copyright Owners fare no better with their renewed contention that the major record labels are not a complementary oligopoly in their dealings with Services. The Judges already struck the Copyright Owners' last attempt to raise that contention, based on their prior ruling in this case and the D.C. Circuit's acknowledgement in *Johnson* of that unappealed ruling.

In Section I, the Services detail the many ways that the Copyright Owners misconstrue *Johnson*. Contrary to their repeated claims, the D.C. Circuit did not "affirm" the 15.1% rate—it vacated that rate. Nor did *Johnson* affirm the [redacted] ratio the Majority used to reach that rate. As the Judges rightly concluded, they are free to use their preferred 3.82:1 ratio, a different ratio, or no ratio at all to derive rates on remand. What *Johnson* actually requires is for the Judges to evaluate the *Phonorecords II* settlement afresh and conduct a "reasoned analysis" to determine a rate level and structure that satisfies the governing rate-setting standard.

In Section II, the Services explain that the Judges are free to adopt a rate structure without a TCC prong. Indeed, doing so is the most effective way to address the significant concerns the D.C. Circuit raised with the TCC prong. Despite their claims to the contrary, the Copyright Owners will still be protected from any revenue diminution concerns even without a TCC prong because, among other reasons, the Working Proposal preserves the *Phonorecords II* mechanical-only floors.

Finally, in Section III, the Services demonstrate that the total royalty rates the Copyright Owners propose as inputs for the Working Proposal are inflated and outdated, and the changes to the Working Proposal the Copyright Owners assert are required—based on the foreclosed and meritless proposition that the major labels have no market power over the Services—are at odds with the governing rate-setting standard, the Judges' prior findings, and *Johnson*.

ARGUMENT

I. THE COPYRIGHT OWNERS CONTINUE TO MISSTATE THE HOLDING OF THE D.C. CIRCUIT'S DECISION IN *JOHNSON*

In *Johnson*, the D.C. Circuit vacated the Majority's "rate structure *and percentages*" because the Majority failed to provide a "reasoned analysis" when it "rejected the Phonorecords

II rates as a benchmark," adopted new rate levels and a new rate structure, and gave the participants no opportunity to address "such a significant, and significantly adverse, overhaul of the mechanical license royalty scheme." 969 F.3d 363, 381, 387 (D.C. Cir. 2020) (emphasis added). Because the court vacated the percentages, the D.C. Circuit did not "address whether the Board adequately considered" factors B through D of the Section 801(b)(1) rate-setting standard in adopting those percentages. *Id.* at 389.

Despite the vacatur of the 15.1% final revenue rate and the court's withholding of judgment on whether that final percentage satisfies factors B through D of Section 801(b)(1), the Copyright Owners assert that "*Johnson* affirmed the Board's derivation of the 15.1% revenue rate," and thus, the Judges "may not alter" the "15.1% revenue rate percentage" on remand. Copyright Owners' Br. in Response to the Additional Materials Orders at 6–7 (COs' Add'l Materials Br.) (cleaned up). They are wrong on both counts. Indeed, the Judges already correctly rejected the Copyright Owners' assertion that the Judges may not adopt a different revenue rate percentage on remand, finding that assertion "meritless" and "inconsistent with *Johnson*," as it "would render the D.C. Circuit's vacating and remanding of the proceeding without force or effect." Jan. 6 Order at 3, 4 n.7.

A. *Johnson* Requires the Judges to Reevaluate—Not Reinstate—the Vacated Rate Levels

Throughout their remand submissions, the Copyright Owners have consistently—and egregiously—distorted the *Johnson* decision. In continuing to challenge the Judges' rejection of that distortion, the Copyright Owners discuss (at 6–7) the portion of *Johnson* in which the D.C. Circuit rejected one specific challenge the Services raised on appeal: that it was "arbitrary and capricious" for the Majority "to rely on information drawn from different expert analyses in calculating the mechanical royalty rates" and to rely on one aspect of an expert's analysis even though it had otherwise rejected that expert's model as unreliable. *Johnson*, 969 F.3d at 384–86. The D.C. Circuit concluded that this "line-drawing and reasoned weighing of the evidence falls squarely within the Board's wheelhouse as an expert administrative agency." *Id.* at 386. That conclusion merely responds to the Services' challenge to the *manner* in which the Majority derived the rates it selected. The D.C. Circuit did not "affirm" any particular input to or output of that process.

The Copyright Owners simply ignore the portions of *Johnson* that address the Services' two other "objections to the particular percentages" the Majority adopted. *Compare Johnson,* 969 F.3d at 384, *with* COs' Add'l Materials Br. at 6–7. The Services challenged the Majority's "rejection of the Phonorecords II and Subpart A settlements as rate benchmarks" and its "conclusions with respect to the four statutory objectives." *Johnson*, 969 F.3d at 384. As to the former, the D.C. Circuit concluded that the Majority "reasonably treated the [Subpart] A settlement rates as, 'at best,' a floor," but it could not "discern the basis on which the Board rejected the Phonorecords II rates as a benchmark" and "remanded" the issue to the Judges "for a reasoned analysis." *Id.* at 386–87. That error, in combination with "fail[ure] to provide adequate notice of the drastically modified rate structure," led the D.C. Circuit to "vacate [the] rate structure and percentages" in the Final Determination. *Id.* at 381. After finding that the Majority's assessment of factor A met the substantial evidence standard, the D.C. Circuit repeated—but did not resolve—the Services' separate challenge to the Majority's assessment of factors B through D, leaving those factors to be reevaluated as part of the remand. *See id.* at 388–89. The D.C. Circuit could not—and did not—"affirm" the 15.1% rate while simultaneously vacating it, directing the Judges to reconsider using the *Phonorecords II* settlement as a benchmark, and instructing the Judges to adopt rates and a structure on remand that satisfy and balance all four of the Section 801(b)(1) factors.

The Copyright Owners assert that the Judges in their January 6 Order "acknowledged" that the Judges may "not alter" the 15.1% percentage-of-revenue rate. COs' Add'l Materials Br. at 6–7. But, as shown above, the Judges already have rejected that position as "meritless," explaining that the assertion that "no alternative rate . . . finding" is possible on remand is "inconsistent with *Johnson*." Jan. 6 Order at 3, 4 n.7. And, contrary to the Copyright Owners' claim (at 6–7), footnote 13 of the January 6 Order expresses the same conclusion. In the second half of the footnote, which the Copyright Owners ignore, the Judges "repeat[ed] for emphasis" that they "do not understand *Johnson* to prevent them from" adopting "rates and a rate structure that differ from those in the Majority's *Phonorecords III Determination*." Jan. 6 Order at 9 n.13. Indeed, in that same footnote, the Judges further state that *Johnson* does not "prevent them" from adopting rates and a rate structure using "the *Phonorecords II*-based benchmark favored by the dissent in the *Phonorecords III Determination*." *Id.* Footnote 13 is thus consistent with the Judges' earlier rejection—on page 3 and in footnote 7 of the January 6 Order—of the Copyright Owners' claim that *Johnson* locked in the 15.1% percentage-of-revenue figure.[1]

B. *Johnson* Does Not Require the Judges to Use a [redacted] Ratio of Sound Recording to Musical Works Royalties

The Copyright Owners also argue that *Johnson* "affirmed" the [redacted] ratio of sound

[1] The Copyright Owners make other arguments that undermine their claim that the D.C. Circuit's rejection of the Services' challenge to the mixing-and-matching of parts of different experts' work locked in the 15.1% percentage-of-revenue rate. That same mixing-and-matching included the Majority's conclusion that the Services' total royalty burden should be equal to [redacted]% of revenue. Final Determination at 75, 87, *Determination of Royalty Rates and Terms for Making and Distributing Phonorecords* (*Phono III*), No. 16-CRB-0003-PR (2018-2022) (Nov. 5, 2018) (Final Det.). But the Copyright Owners repeatedly argue (incorrectly) that "the [redacted]% combined royalty figure is too low" and that combined royalty rates should instead be in the range of "[redacted]." COs' Add'l Materials Br. 26, 29.

recording to musical works royalties that the Majority used in calculating its vacated percentage-of-revenue rate. COs' Add'l Materials Br. at 2–3. But the D.C. Circuit did not affirm the [redacted] ratio any more than it affirmed the 15.1% rate—indeed it did not affirm *any* particular inputs to or outputs of the Majority's methodology. The court simply held that the Majority's *methodology*—mixing and matching from multiple experts' analyses—was the "type of line-drawing and reasoned weighing of the evidence" that fell within the Judges' wheelhouse. *Johnson*, 969 F.3d at 386. That is it. *Johnson* does not require the Judges to use a [redacted] ratio, or a [redacted] ratio, or any ratio at all. Nor does it require the Judges to follow a particular path to arrive at revised rate levels on remand. Instead, it requires the Judges to evaluate the *Phonorecords II* settlement afresh, conduct a "reasoned analysis" to determine a rate level, and ensure that the rate level satisfies the governing rate-setting standard. *Id.* at 387–88.

As noted, the January 6 Order acknowledges that the Judges are free to adopt the rate levels and structure from *Phonorecords II* (as the Services have proposed). Jan. 6 Order at 9 n.13. Doing so would reflect a standard benchmarking approach to rate-setting that would not require the Judges to utilize *any* particular ratio of sound recording to musical works royalties. For reasons the Services have pointed out, and as Judge Strickler explained, that makes it a better and more dependable rate-setting methodology than the Shapley-inspired analysis the Majority relied on in the now-vacated Final Determination. The Judges need not hypothesize what the royalty rate levels would be in a theoretical market—they can simply look at a benchmark reflecting negotiations between the same parties over the same rights at issue in this proceeding and under equivalent economic circumstances. *See Determination of Royalty Rates and Terms for Making and Distributing Phonorecords* (*Phono III*), Final Rule, 84 Fed. Reg. 1918, 1999 (Feb. 5, 2019) (Dissent); Services' Joint Opening Br. 19–24.

Moreover, the D.C. Circuit's conclusion that the Majority's analysis of factor A was "a reasonable reading of the record" does not require the Judges on remand to increase royalties above the *Phonorecords II* rate levels. *See Johnson*, 969 F.3d at 387–88. No single statutory rate-setting factor can dictate the rate levels that the Judges ultimately select. Rather, because the "factors pull in opposing directions," the Judges must harmonize *all four* of the competing objectives—including factors B through D—"to achieve an equitable division of music industry profits between the copyright owners and users." *SoundExchange, Inc. v. Libr. of Cong.*, 571 F.3d 1220, 1224 (D.C. Cir. 2009) (citations omitted); *accord Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1339 (D.C. Cir. 2012) (explaining that the Judges must select rates that "serve all these objectives adequately but to differing degrees" (citation omitted)). As the Services have previously explained, the *Phonorecords II* settlement equitably balances all of the Section 801(b)(1) factors. Services' Joint Opening Br. 24–30.

As an alternative to benchmarking, the Judges are free to "rely on information drawn from different expert analyses," as long as that approach is supported by a "reasoned analysis" and the result of that approach satisfies the statutory rate-setting standard. *Johnson*, 969 F.3d at 384, 387–88. As the Services have previously explained, the analysis the Majority performed (combining a [redacted] sound recording-to-musical works royalty ratio with a total royalty burden of [redacted]% to arrive at a 15.1% musical works rate) did *not* satisfy three of the four Section 801(b)(1) factors. Services' Joint Opening Br. 44–64. Similarly, the Services have explained that the Working Proposal would not satisfy those rate-setting factors without adjustment. Services' Joint Supplemental Brief Addressing the Judges' Working Proposal at 15–29 (Services' Joint Working Proposal Br.). If the Judges take either of these approaches, they will need to make meaningful adjustments to ensure that the resulting rates satisfy all four components of the governing standard.

II. THE JUDGES HAVE THE AUTHORITY TO ADOPT A RATE STRUCTURE WITHOUT A TCC PRONG, AND THE WORKING PROPOSAL ACCOMMODATES THE COPYRIGHT OWNERS' OVERBLOWN REVENUE DIMINUTION CONCERNS

As an initial matter, the Copyright Owners are wrong to assert (at 4–6) that eliminating the TCC prong is outside the scope of the remand. To start, *Johnson* "vacate[d]" both the "rate structure and percentages." 969 F.3d at 381. The scope of the remand thus requires reconsideration of the rate structure—including whether that structure should include a TCC prong. Indeed, the D.C. Circuit's vacatur was due in part to significant concerns about how a TCC prong "yokes the mechanical license royalties to the sound recording rightsholders' unchecked market power." *Id*. at 382. It is therefore incumbent on the Judges to reevaluate the appropriateness of a TCC prong. And, while the Services have long argued that caps on the TCC prong are one method of checking its deleterious effects, an even more direct method of addressing the concern the D.C. Circuit raised is to eliminate the TCC prong entirely.

Moreover, the Copyright Owners are wrong to suggest (at 9–24) that concerns regarding "revenue diminution and mismeasurement" require retention of the TCC prong. The Working Proposal addresses these concerns through other means. And, in any event, the Copyright Owners' expressed concerns over revenue diminution are overblown and misleading.

A. The Rate Structure from the Working Proposal Adequately Addresses Revenue Diminution Concerns

The Judges' Working Proposal is not a pure percentage-of-revenue rate structure—it retains the mechanical-only floor fees from *Phonorecords II*. Order Directing the Parties to Provide Additional Materials at 4, eCRB Doc. No. 25965 (Dec. 9, 2021) (Dec. 9 Order). Those floor fees guarantee a certain level of payment based on the number of subscribers to a service irrespective of that service's revenue; thus, they serve the same function as TCC in protecting against potential revenue diminution. Written Second Supplemental Remand Testimony of Leslie M. Marx at ¶¶ 37–38 (Marx WSSRT). There is no need for both belt and suspenders.

The Copyright Owners assert that these floor fees are ineffective at addressing revenue diminution and that uncapped TCC is thus necessary, but those assertions fail. *First*, the Copyright Owners suggest (at 12, 20–21) that "indisputable evidence" of revenue diminution in the record is what "caused" Google to propose a rate structure including uncapped TCC (and caused the Majority to adopt that aspect of Google's proposal) rather than relying on capped TCC or floor fees. That is nonsense. As Google explained, the primary motivation for Google's post-hearing proposal, which removed TCC "caps" (along with floor fees and all service category distinctions), was to address "concerns" the Judges had voiced "over the breadth and complexity of the existing § 115 rates and terms"; assertions about revenue diminution were not the catalyst for the proposal. *See* Google PFF ¶ 56. In addition, in adopting an uncapped TCC prong, the Majority's now-vacated determination did not describe uncapped TCC as the only means of addressing revenue diminution concerns. The Copyright Owners' attempt to belatedly ascribe motivations to Google and the Judges is unavailing.

Second, the Copyright Owners argue (at 19) that the purpose of floor fees is to protect against "the risk of increased performance royalties reducing or eliminating mechanical royalties," which could impact publishers' business interests. But, as Professor Marx explains, the floor fees simultaneously protect against that risk *and* are effective at addressing revenue diminution concerns. Marx WSSRT ¶¶ 37–38. Thus, the Copyright Owners' argument about the original intent of these fees (whatever its merits) is of no moment.[2] Moreover, there is little

[2] The Copyright Owners suggest (at 19–20) that the Services also acknowledged throughout the original *Phonorecords III* proceeding that TCC and per-subscriber minimums—not floor fees—were the proper and intended mechanism for addressing revenue diminution concerns. This

risk of future revenue diminution at this late point in the rate period. Services have already set their prices and earned their revenues for more than 80 percent of the rate period.[3] Whatever marginal additional value a TCC prong has in addressing the risk of future revenue diminution is dramatically lessened in these circumstances where the rates and terms the Judges set will be applied almost entirely retrospectively.

Third, the Copyright Owners argue (at 20) that the record lacks evidence about how the parties to the *Phonorecords II* settlement arrived at the floor fees. This is immaterial. The floor fees are known, and were part of an industry-wide settlement involving the same or similar parties that was agreed to in *Phonorecords I* and carried over in the *Phonorecords II* settlement. *See* Services' Joint Opening Br. at 20–23. As such, the fees are derived from a benchmark that provides *objective evidence* of a reasonable rate. *See Phono III*, 84 Fed. Reg. at 1999–2001 (Dissent) ("[T]he absence of more direct testimony regarding what went through the minds of the negotiators of the 2008 and the 2012 settlement[s] does not diminish the objective value of this benchmark."); *see also* Services' Joint Opening Br. at 35–37.[4] The Copyright Owners' assertion

---

distorts the Services' position. During the original proceeding, the Services argued for elimination of the floor fees (and retention of capped TCC) and noted that capped TCC was one way of addressing concerns the Copyright Owners raised about revenue recognition under a percentage-of-revenue based structure. But that does not mean that there are no other approaches for addressing these concerns.

[3] Given that most of the rate period has already elapsed, performance royalties for the period are already known, and the Copyright Owners have not argued or presented evidence in support of the proposition that the floor fees are currently too low to ensure a proper mechanical rate due to increased performance royalties.

[4] Notably, the Copyright Owners have failed to put forward evidence suggesting that the floor fees are outdated or no longer applicable due to changed market conditions. And while the Copyright Owners have argued that the entire *Phonorecords II* benchmark is dated due to changed market conditions, the Copyright Owners' other actions, including rolling-over the rate for digital downloads in *Phonorecords III* and again in *Phonorecords IV* without even an adjustment for inflation, belie this argument. *See* Services' Joint Opening Br. at 32, 42–43.

that more is needed just repeats their failed argument that, to serve as a benchmark, the record must contain evidence of the subjective intent of the parties to the *Phonorecords II* settlement. *See Johnson*, 969 F.3d at 387 (criticizing the Majority's failure to "explain why evidence of the parties' subjective intent in negotiating the Phonorecords II settlement is a prerequisite to its adoption as a benchmark"). Moreover, the Copyright Owners (who were also party to the settlements) had both the ability and incentive to come forward with such evidence if it was relevant or helpful to them. *See Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings* (*Web IV*), Final Rule, 81 Fed. Reg. 26,316, 26,384–85 (May 2, 2016) ("[W]hen a party fails to provide such important, competent and probative factual or expert evidence [regarding the supposed improper use of a benchmark], the Judges are left with no evidentiary basis to support the assertion that the alleged additional value of other contractual items is sufficient to alter the rates and terms of the benchmark agreements in which they are contained."). That they did not speaks volumes.

Fourth, the Copyright Owners contend (at 18) that mechanical floor fees are insufficient because *Phonorecords II* does not include them for all service types. But *Phonorecords II* contains floor fees for the most financially consequential service types—*i.e.*, full-service subscription offerings. While the Copyright Owners make much of the fact that ad-supported services lack a *Phonorecords II* floor fee, the [redacted]. Marx WSSRT ¶ 38 & n.50. As to the remaining offerings that do not have floor fees, such as locker services and limited offerings, the Copyright Owners fail to provide evidence that they have material subscriber counts or are offered at meaningfully discounted prices that give rise to revenue diminution concerns.

B. The Copyright Owners' Arguments Concerning Revenue Diminution Are Misplaced

The Copyright Owners' argument for retaining the TCC prong (and for uncapped TCC for all service categories) hinges on the premise that, barring some backstop in the statutory royalty structure, Services are likely to "highly discount or *give away for free* the music service." *See* COs' Add'l Materials Br. at 21–22. The argument is unconvincing for a few reasons. To start, the Copyright Owners ignore that because this rate-proceeding is now almost entirely backwards looking, there is little reason for concern that the Judges' decision will provide the Services with the incentive to defer revenue. The Services cannot "highly discount or give away" services they have already sold; thus, any argument about the rate structure deterring certain activities is implausible.

The evidence that the Copyright Owners cite (at 10–12) also fails to support their allegations of past "revenue diminution and mismeasurement." The Services have repeatedly addressed the Copyright Owners' rehashed "evidence" on this point, but the Copyright Owners choose to ignore all countervailing evidence and continue beating the same drum. As an initial point, the Copyright Owners make the unremarkable observation that streaming companies (like all companies) are interested in long-term growth, and they postulate that large companies like Google and Apple may reap other benefits (like brand recognition) from operating a music service. But these assertions do not in any way demonstrate that Services are somehow hiding or deferring the revenue earned from their music offerings. Indeed, it is far more likely that the benefits flow in the opposite direction, with brand recognition leading to additional Service subscribers and higher royalties. More fundamentally, many of the documents the Copyright Owners cite simply do not say what the Copyright Owners claim, are taken wildly out of context, or have otherwise been discredited in this proceeding. For instance, the Copyright Owners cite to [redacted]. COs' Add'l Materials Br. at 11. However, it was already established that Google's internal documents demonstrated [redacted]. *See* Joint Submission Regarding Copyright Owners' Mot. to Compel Produc. of Additional Financial Docs. at G4–G11, eCRB Doc. No. 12296 (Feb. 2017) (discussing Copyright Owners' misinterpretation of internal Google documents); Order on Mot. to Compel Further Financial Disc. at 2 (Mar. 3, 2017) (noting that documents cited by Copyright Owners [redacted]).

Similarly, [redacted]. COs' Add'l Materials Br. at 11 (citing HX-113). But, as Amazon's witness testified, the Copyright Owners' assertions about this document "have it backwards." HX-111 ¶¶ 20–21 (Mirchandani WRT). [redacted]. *See* HX-111 ¶¶ 20–21 (Mirchandani WRT); 3/16/17 Tr. 1426:16–1427:12, 1428:24–1429:23 (Mirchandani). This pricing is a "[redacted]" for Copyright Owners and Amazon. Final Det. at 61–62, 64 (Dissent); *see id.* at 20 n.49 (Majority) (similarly explaining that [redacted]).

The Copyright Owners also argue (at 17–18) that revenue diminution must be rampant—and a TCC prong necessary—because Dr. Eisenach estimates that [redacted] by eliminating the TCC prong.[5] The reliability of this analysis is questionable at best. *See* Third Supplemental Written Remand Testimony of Gregory Leonard ¶ 12 (Leonard TSWRT) (explaining how Dr. Eisenach's analysis is based on projections of future streaming performance). But more fundamentally, this argument involves a massive logical leap since it assumes (without justification) that the higher rate must be appropriate. To get there, the Copyright Owners observe that royalties would be higher with the uncapped TCC prong and then assume that the difference in royalties without that TCC prong must be attributable to revenue diminution. Dr. Eisenach never considers that those higher royalties are evidence of exactly what the D.C. Circuit was concerned about—that an uncapped TCC prong imports the complementary oligopoly power of record labels into the mechanical market and raises the rates paid by some services above the intended rate levels. For this reason, Dr. Eisenach's calculation—even if it were reliable—proves nothing.

III. THE COPYRIGHT OWNERS' IMPLEMENTATION OF THE WORKING PROPOSAL'S RATE-SETTING FORMULA IS FLAWED

The Copyright Owners never provide the Judges with a faithful implementation of the rate-setting formula in the Working Proposal. Instead, they attack the Working Proposal, beginning with the incorrect premise that the Judges must replace the 3.82:1 sound recording-to-musical works ratio in the Working Proposal with the [redacted] Shapley ratio the Majority used in

---

[5] Interestingly, Copyright Owners believe they can have it both ways. They have consistently argued throughout the remand that there could be no disruptive impact on the Services from the vacated *Phonorecords III* rates and terms, while at the same time now arguing that uncapped TCC extracts an extra [redacted] from the Services. The two concepts cannot be squared without buying into the see-saw theory [redacted].

the Final Determination (while at the same time insisting that the Judges disregard the [redacted]% combined royalty also used by the Majority to derive the vacated rates). From there, the Copyright Owners propose a laundry list of irrelevant, outdated, and inflated combined royalty rates to incorporate into the Working Proposal, without ever explaining how these total royalty rates achieve the Judges' stated goals. Having argued for the use of an inappropriate ratio and inflated total royalty rates, the Copyright Owners then once again claim that the major record labels do not form a complementary oligopoly, even though the Judges and D.C. Circuit repeatedly have held to the contrary. Finally, the Copyright Owners contend (incorrectly) that any rate less than 15.1% cannot satisfy the Section 801(b)(1) factors.

As we explain below, the Copyright Owners are wrong at every turn.

A. The Copyright Owners' Assertion that the Judges Must Replace the Ratio in the Working Proposal with the Shapley Ratio from the Vacated Final Determination Is Wrong

The rate-setting formula the Majority used in the Final Determination to derive the vacated 15.1% rate combined two data points from different Shapley analyses: the [redacted]% total royalty taken from a Shapley model Professor Marx put forward, which was then split between the sound recording and musical works rightsholders using the [redacted] Shapley ratio Professor Gans put forward. The result was a musical works rate of 15.1% and a sound recording rate of [redacted]%, leaving—in theory but not in practice—the remaining [redacted]% of revenue for the Services. *See, e.g.*, Marx WSSRT ¶ 25; *see also* Additional Written Direct Testimony of Richard Watt ¶¶ 15–16 & fig.1 (Watt AWDT). While the D.C. Circuit concluded that it was within the purview of the Judges to combine the two Shapley figures in this way, the court vacated the resulting 15.1% rate. *See supra* Section I.

The Working Proposal takes a different approach to rate-setting. Rather than begin with a theoretical total royalty from a Shapley model, it starts with a total royalty from the real world—the rate that "the Majors agreed to allow the interactive services to retain" so that those services can "survive." Dec. 9 Order at 2–3. Because this new rate-setting approach starts from a real-world total royalty (albeit a royalty that must be adjusted to account for the major labels' market power)—rather than the [redacted]% that formed the basis of the Majority's Shapley modeling—it is more like a traditional benchmarking approach than one dictated by theoretical models.

Rather than recognize this fundamental distinction between the two approaches, the Copyright Owners instead claim that the Working Proposal "formula is mathematically the same as the Final Determination formula to derive the revenue rate, but utilizes a ratio that did not come from the Board's Shapley analysis." COs' Add'l Materials Br. at 25. Proceeding from this incorrect premise, the Copyright Owners contend that the Working Proposal must therefore be adjusted to use the "proper" ratio of [redacted] so as to make the two approaches "mathematically the same." *Id.* The Copyright Owners are wrong. The rate-setting formula in the Working Proposal is *not* the same as that used by the Majority—the two approaches are based on different premises, with one looking to real-world total royalties and the other looking to the results of theoretical Shapley models.[6] Nor should they be the same. The rate-setting formula the Majority previously used resulted in a rate that the D.C. Circuit vacated.

Moreover, because the rate-setting formula in the Working Proposal purports to divide a *real-world* total royalty dictated by the major labels, Dec. 9 Order at 2–3, it makes no sense to look to (much less insist on) a *theoretical* ratio taken from a Shapley model to do so. It makes far more sense to use one of the real-world ratios the Judges previously credited (after making an appropriate adjustment to account for record label market power), as the Services have

[6] The two formulas are only "the same" to the extent that they both divide a total royalty using a ratio, but both the total royalty and the ratio are different.

explained. Services' Joint Working Proposal Br. at 24–26.[7] And if a Shapley ratio *is* used, at a minimum it must be adjusted to account for the fact that in the real world the major labels use their complementary oligopoly power to secure inflated royalty rates well above those indicated by the Shapley models. The Majority made such an adjustment to the [redacted] ratio to arrive at the 3.82:1 ratio. Final Det. at 73. As Professor Marx explains, the Copyright Owners' proposal to revert to the [redacted] Shapley ratio undoes the adjustment that the Majority previously concluded was necessary to avoid "importing complementary oligopoly profits into the musical works rate." Written Supplemental Remand Rebuttal Testimony of Leslie M. Marx ¶¶ 15–21 (Marx WSRRT) (quoting Final Det. at 73). By insisting that the [redacted] ratio be used, the Copyright Owners are attempting to import the market power of the major labels into the regulated musical works rate. Doing so would result in inflated musical works rates that are at odds with the governing rate-setting standard and *Johnson*. *Id.*

B. The Copyright Owners' Proposed Total Royalty Inputs Are Outdated and Flawed

While the Copyright Owners never supply the Judges with a faithful implementation of the Working Proposal, they do propose a series of (inappropriate) total royalty rates to use as inputs. Through Professor Watt, the Copyright Owners offer a range of total royalties taken from two different Shapley models, spanning from [redacted]% to [redacted]%. The lower portion of this range—[redacted]% to [redacted]%—is made up of the total royalties from Professor Watt's Shapley model from the rebuttal phase of the original proceeding. The upper portion—ranging from [redacted]% to [redacted]%—comes from the Shapley model put forward by Professor Gans in his rebuttal testimony.

[7] These real-world ratios include the [redacted] ratio repeatedly agreed to by the record labels and music publishers, ratios ranging from [redacted] to [redacted] from direct licenses, and the [redacted] ratio from the Pandora "opt-out" agreements, all of which are well above even the 3.82:1 ratio contained in the Working Proposal. Final Det. at 40–41, 48, 51, 61–62.

None of these total royalty figures are useful as inputs into the Working Proposal.

As an initial matter, Professor Watt never attempts to justify looking to theoretical Shapley royalties when, as he acknowledges, the total royalty the Judges requested as an input for the Working Proposal is the "*market-based* percent-of-revenue that the Major record labels allow the interactive services to retain in order to provide for the latter's viability." Watt AWDT ¶ 41 (emphasis added) (quoting Jan. 6 Order at 11). He simply asserts, without any supporting rationale, that "[w]e can find guidance on proper numbers for these [market-based rates] from the Shapley analysis evidence in the record." *Id.* But, as Professor Marx has explained, it makes no sense to look to theoretical models to determine market-based rates, particularly when there is actual evidence of market-based rates in the record. Marx WSSRT ¶¶ 8, 12; Marx WSRRT ¶ 24.

In addition, the Copyright Owners have presented a range of rates that is biased upwards. First, they ignore the far lower [redacted]% total royalty from Professor Marx's Shapley analysis.[8] While the Copyright Owners repeatedly (and erroneously) assert that the vacated 15.1% rate and the specific calculations used by the Majority to derive that rate were "affirmed" by the D.C. Circuit, and insist they be retained, when it comes to looking for an appropriate total royalty rate to use in the Working Proposal's rate-setting formula, the Copyright Owners omit the [redacted]% total royalty used by the Majority in that same purportedly "affirmed" analysis. COs' Add'l Materials Br. at 6–7, 26. It is unreasonable to claim that the 15.1% vacated rate and [redacted] ratio from the Majority's analysis must be maintained no matter what, but the [redacted]% total royalty that formed the backbone of that same analysis should be ignored.

As to the range of Shapley rates that the Copyright Owners propose, the Judges already

[8] When plugged into the Working Proposal rate-setting formula, the [redacted]% total royalty yields a musical works rate of [redacted]%.

correctly rejected all but the very low end as being outside the range of plausible total royalties for use in rate-setting. After evaluating the range of rates resulting from Professor Watt's Shapley model, the Majority decided to give that model weight "only to the extent of viewing his *lowest* figure ([[redacted]]%) as an *upper* bound for total royalties in computing a royalty rate." Final Det. at 75 (emphasis added). If the Judges were to draw the total royalty input from a Shapley model rather than from real-world information, the only number that is worth even contemplating from the range put forward by Professor Watt is [redacted]%, and that, according to the Majority, is at best an upper bound. Plugging that [redacted]% into the Judges' rate-setting formula (and without making any of the adjustments the Services have previously shown to be necessary) yields a musical works rate ceiling of [redacted]%.

As to the range of rates coming from Professor Gans' Shapley model, the Judges correctly gave those no weight at all.[9] Indeed, the Judges did not even mention the Shapley models Professor Gans put forward on rebuttal when assessing royalty rates. The Copyright Owners offer no explanation for why that prior conclusion should be revisited now.

All told, while using Shapley total royalties is at odds with the basic premises of the Working Proposal, if those rates were to be used as a proxy for market-based rates, the appropriate range is not the one Professor Watt proposes, but [redacted]% to [redacted]%, resulting in musical works royalties between [redacted]% and [redacted]% before making necessary further adjustments.

The Copyright Owners, through Dr. Eisenach, also propose a variety of "benchmark" total royalty rates ranging from [redacted]% to [redacted]% of revenue. These marketplace rates are outdated and, in certain cases, inflated. First, Dr. Eisenach proposes a total royalty rate of 70% based on

---

[9] As Professor Marx explains, the Gans Shapley model uses inputs that are wildly off-base. Marx WSRRT ¶ 24 n.32.

what he refers to as the "industry standard split of revenues between rightsholders and Services." Additional Written Direct Testimony of Jeffrey A. Eisenach ¶ 27 (Eisenach AWDT). To buttress this claim, Dr. Eisenach points to a 2016 statement from Spotify's then general counsel, the [redacted] paid during the 2015/2016 time frame, and a 2015 announcement from Apple Music. Eisenach AWDT ¶¶ 27–29. But, as the Services have shown, these numbers are long outdated and, as a result, offer no insight into what the labels have decided to leave the Services with to "survive" over the relevant time period. Services' Joint Working Proposal Br. at 13–14. A far more probative real-world total royalty rate for the relevant period is the [redacted]% rate that emerged from the negotiations between [redacted] just before the *Phonorecords III* period started.[10]

Next, Dr. Eisenach points to his calculation (from certain MLC data) of a [redacted]% weighted average total royalty he claims was paid by the four Services in 2017. Eisenach AWDT ¶ 31.[11] This royalty rate is dramatically inflated by outliers factored into the average, as even a cursory look at the underlying data demonstrates. Marx WSRRT ¶ 26. Specifically, Dr. Eisenach previously testified that in 2017 [redacted]. Remand Written Rebuttal Testimony of Jeffrey A. Eisenach ¶ 13 & fig.1 (Eisenach RWRT). It obviously cannot be the case that the "survival" rate for any Service is [redacted]% of its total revenue. That alone calls use of the [redacted]% rate into serious question. Indeed, Dr. Eisenach previously conceded that this [redacted]% royalty figure is distorted [redacted].

[10] When used in the Working Proposal rate-setting formula, this total royalty yields a musical works rate of [redacted]%.

[11] Like Professor Watt, Dr. Eisenach never explains why this is an appropriate rate to use in the Working Proposal rate-setting formula. He only notes that it is a total royalty he previously calculated. Eisenach AWDT ¶ 31.

Eisenach RWRT ¶ 19 n.32; *see* Written Supplemental Remand Testimony of Rishi Mirchandani ¶ 22 (Mirchandani WSRT).[12] Despite acknowledging this problem, Dr. Eisenach made no effort to account for it when proposing this total royalty for use in the Working Proposal.

The other rates included in this weighted average are also inflated. As Dr. Leonard explained, [redacted]. Written Supplemental Remand Testimony of Dr. Gregory K. Leonard ¶ 10. [redacted]. Dr. Eisenach similarly uses a misleading total royalty for Pandora. As Mr. Barnes previously explained, [redacted]. Written Supplemental Remand Testimony of Jonathan Barnes ¶¶ 8–10. And finally, as to Spotify, [redacted]

[12] This figure is also inflated by the fact that Unlimited was still a nascent service in 2017. [redacted] *See* Mirchandani WSRT ¶ 19 & fig.4.

[redacted]. Marx WSRRT ¶ 26 n.35. Dr. Eisenach should have been aware of these issues, which the Services previously identified. But rather than account for these problems, he ignored them all, making no adjustments and making no effort to explain away these foundational problems with his analysis.[13]

Dr. Eisenach also offers, as a "robustness check," certain royalty splits from "other markets in which digital content is distributed to users." Eisenach AWDT ¶ 32. He looks at 2015 and 2016 payments from Netflix to audio-visual content rightsholders; 2012 payments from Hulu to audio-visual content rightsholders; and 2011 royalties paid by iTunes. These royalty splits from other markets are irrelevant. Not only are they outdated, but they come from different types of services that offer no insight into the Services' survival rates as dictated by the major record labels. Marx WSRRT ¶¶ 26–27.

C. The Copyright Owners' Argument that the Major Labels Do Not Form a Complementary Oligopoly Was Waived and Is Wrong

In an apparent effort to justify using a Shapley ratio of [redacted] in the Working Proposal rate-setting formula, the Copyright Owners once again argue that the major record labels do not form a complementary oligopoly and do not secure supra-competitive rates. COs' Add'l Materials Br. at 27–28.

[13] Dr. Eisenach also proposes his calculated weighted average total royalty paid by the four Services over the "P3 Rate Activity Period" of [redacted]%. Eisenach AWDT ¶ 31. While the calculations underlying this weighted average are less troubling than those underlying the [redacted]% 2017 rate, Dr. Eisenach never explains why this is a useful input into the Working Proposal rate-setting formula. Moreover, Dr. Eisenach asserts that this total royalty rate, when incorporated into the rate-setting formula, yields a musical works rate of [redacted]%. *Id.* That is wrong, and Dr. Eisenach only reaches this conclusion by inappropriately changing the Judges' formula. When this total royalty is plugged into the actual rate-setting formula, the resulting musical works rate is [redacted]%.

The Copyright Owners already attempted to re-litigate this issue in this remand and lost. In granting in part the Services' motion to strike portions of the Remand Written Rebuttal Testimony of Daniel F. Spulber, Ph.D., "in which Professor Spulber disputes the existence of licensors' complementary oligopoly power in the sound recording industry"—testimony that the Copyright Owners now attempt to submit again—the Judges agreed with the Services that "this issue: (1) was not raised before the Judges; and (2) not raised on appeal to the D.C. Circuit; and (3) not remanded by the D.C. Circuit to the Judges for further consideration." Order on Services' Motion to Strike Copyright Owners' Expert Testimony at 13, eCRB Doc. No 25704 (Oct. 1, 2021). "Rather, the Judges and the D.C. Circuit acknowledged the presence of this complementary oligopoly power in the sound recording market, as found in prior decisions." *Id.*[14] Because Professor Spulber's Additional Written Direct Testimony is identical to the testimony that the Judges have already struck from the record, it should be treated no differently now—it should be stricken again or, at a minimum, be afforded no weight.

Even putting to one side that this is a settled issue, the Copyright Owners' latest attempts to show that the major record labels do not form a complementary oligopoly are meritless. A fuller assessment of these claims is contained in the testimonies of Professors Marx and Katz and Dr. Leonard. Marx WSRRT ¶¶ 3–14; Leonard TSWRT ¶¶ 4–7; Written Supplemental Rebuttal Remand Testimony of Michael D. Katz ¶ 3. To summarize:

- Professor Spulber offers an overly rigid analysis that is belied by basic economic intuition and nearly two centuries of economic scholarship. There is no need for the marketplace in which record labels negotiate with the Services to meet every element of the original 1838 Cournot model to reach the conclusion that the major labels form

[14] In the recent *Web V* determination, the Judges once again reached the same conclusion. *See, e.g.*, Final Determination at 14, 46–49, *In re Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances* (*Web V*), No. 19-CRB-0005-WR (2021-2025) (Jul. 22, 2021).

a complementary oligopoly.

- Professor Watt ignores critical elements of the agreements between the major labels and the Services (including, but not limited to, [redacted] Watt AWDT ¶ 52. [redacted].
- Dr. Eisenach's analysis boils down to the unsupported claims that because there is bargaining between labels and services and because there is market growth, the negotiated rates must be effectively competitive. That claim is at odds with basic economics, and the Judges rejected it in *Web IV*.
- While not supported by any of their experts, the Copyright Owners claim that the major labels cannot be a complementary oligopoly because [redacted]." COs' Add'l Materials Br. at 27–28. Not only is this factually wrong, *see, e.g.*, Marx WSSRT ¶ 17 n.23, but it also ignores that [redacted].

In short, the Copyright Owners and their experts offer nothing that in any way undermines the repeated findings of the Judges and the D.C. Circuit that the major record labels form a complementary oligopoly.

D. The Copyright Owners Incorrectly Apply the Section 801(b)(1) Factors to the Working Proposal

In a final effort to justify inflated rate levels, the Copyright Owners contend that unless the Working Proposal is modified to use the [redacted] ratio, it will be at odds with the Section 801(b)(1) factors.

They first argue that by using the 3.82:1 ratio, the Working Proposal produces "improperly low royalty rates" and it is only by swapping in the [redacted] ratio that the Working Proposal becomes "consistent with Factor A and *Johnson*." COs' Add'l Materials Br. at 29. That makes no sense. While the D.C. Circuit concluded that the Majority's prior assessment of factor A was adequately supported, there is nothing in the Majority's prior analysis of factor A that is dependent on any particular sound recording-to-musical works ratio—[redacted] or otherwise. The Majority's prior analysis of factor A was untethered to any particular ratio.[15]

The Copyright Owners next contend that the Working Proposal, "if not corrected [to use the [redacted] ratio], is not consistent with Factors B and C," and that any rate below 15.1% would not satisfy factors B and C. COs' Add'l Materials Br. at 29–30. The Copyright Owners reach this conclusion by repeating the nonsensical claim that *Johnson* affirmed the rate it vacated. That cannot be right, as the D.C. Circuit (among other things) expressly *did not* resolve the substantive challenges the Services' raised regarding the Final Determination's assessment of factors B and C. *See supra* Section I.

Moreover, if it is true, as the Copyright Owners (wrongly) contend (at 29–30), that *Johnson* requires a musical works royalty of 15.1% (and the use of the [redacted] ratio), then it also must be true that *Johnson* requires the Judges to leave the Services with [redacted]% of their revenue. Services' Joint Opening Br. at 56–58. But because in the real world the record labels take far more than what the model previously used by the Majority says they "should," it is impossible to leave the Copyright Owners with 15.1% and the Services with [redacted]%. *Id.* Rather than attempt to fairly resolve this basic problem, the Copyright Owners focus their discussion of factors B and C entirely on what this model says *they* should get and ignore what the exact same model says the *Services* should keep. That entirely one-sided view squarely violates factors B and C, which require the Judges to account for the roles of *both* the Copyright Owners and the Services and to

[15] In discussing factor A, the Copyright Owners claim (again) that the [redacted] ratio must be used and "that the [redacted]% combined royalty figure is too low." COs' Add'l Materials Br. at 29. But both that ratio and that total royalty come from the analysis that the Copyright Owners (wrongly) claim was "affirmed." The Copyright Owners cannot have it both ways.

ensure both a fair return for the Copyright Owners and a fair income for the Services under existing economic conditions (which necessarily include the record companies taking more than [redacted]% of revenue on their own). The Services, in contrast, *have* offered a solution to this "imbalance" problem—one that gets the Copyright Owners and the Services equally close to what they "should" get according to the Majority's model. Written Direct Remand Testimony of Leslie M. Marx ¶¶ 52–63; Services' Joint Opening Br. at 56–58.

As the Services have shown, the Working Proposal suffers from the same "imbalance" problem: it focuses on rewarding the Copyright Owners and leaves the Services with just their "survival" rate. By definition, that does not reward the Services for their relative contributions or leave them with a fair income. *See* Written Supplemental Remand Testimony of Michael L. Katz ¶¶ 7–13 (Katz WSRT); Marx WSSRT ¶ 20–21; Leonard TSWRT ¶¶ 9–12. And because the Working Proposal assumes a 100% see-saw effect—something that even Professor Watt acknowledges will never happen (Watt AWDT ¶ 48)—if mechanical rates are raised *at all,* the Services will be left with even *less* than the intended survival rate. *See* Katz WSRT ¶¶ 3, 8, 23; Marx WSSRT ¶ 21–22; Leonard TSWRT ¶ 5–7. Professor Marx has proposed a solution for this variation of the "imbalance" problem. By taking label rates as they are (*i.e.*, assuming, consistent with the record evidence and the fact that label rates have already been set and largely been paid, that there will be no see-saw effect) and then dividing up what is left over in a more balanced way between the Copyright Owners and the Services (as factors B and C require), the resulting musical works royalty rate ranges from [redacted]% to [redacted]%. Marx WSSRT ¶¶ 25–29; Services' Joint Working Proposal Br. at 27–29.

Finally, the Copyright Owners claim, based solely on their misreading of *Johnson*, that if the Working Proposal does not result in increased musical works rates, it will not satisfy factor

D. COs' Add'l Materials Br. at 30. The Copyright Owners have it exactly backwards. As the Services have already shown, because the Working Proposal is premised on leaving the Services with just their survival rate, it poses a very significant risk of disruption *to the Services*. Services' Joint Working Proposal Br. at 19. Worse, because the Working Proposal assumes a 100% see-saw effect, which, as noted above, will not happen, the Services will end up with something *less* than the intended survival rate. *Id.* at 20–22. That cannot satisfy factor D. As a result, if the Working Proposal is used to determine a musical works rate, the resulting rate must be reduced to minimize the risk of disruption. More concretely, after using the best available market-based total royalty to determine the Services' survival rate, the Working Proposal calls for a rate of [redacted] %. *Id.* at 6–13. To satisfy the governing rate-setting standard, that rate must be reduced. *Id.* at 15–29.

CONCLUSION

The Judges should rely on the *Phonorecords II* settlement as a benchmark and adopt the Services' Proposal. If the Judges instead rely on the methodology set forth in the Working Proposal, they should use the input the Services have identified as well as the adjustments needed to ensure that the formula can yield rate levels that satisfy all four Section 801(b)(1) factors.

February 24, 2022

Respectfully submitted,

/s/ Kenneth L. Steinthal
Kenneth L. Steinthal
J. Blake Cunningham
David P. Mattern
KING & SPALDING LLP
101 Second Street, Suite 2300
San Francisco, California 94105
Tel.: (415) 318-1200
Fax: (415) 318-1300
ksteinthal@kslaw.com
bcunningham@kslaw.com
dmattern@kslaw.com

Counsel for Google LLC

/s/ Benjamin E. Marks
Benjamin E. Marks
Todd Larson
Aaron J. Curtis
David J. Bier
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Tel.: (212) 310-8000
Fax: (212) 310-8007
benjamin.marks@weil.com
todd.larson@weil.com
aaron.curtis@weil.com
david.bier@weil.com

Counsel for Pandora Media, LLC

/s/ Richard M. Assmus
Richard M. Assmus
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
Tel.: (312) 782-0600
Fax: (312) 706-9125
rassmus@mayerbrown.com
– and –
A. John P. Mancini
Jacob B. Ebin
Allison Aviki
Margaret Wheeler-Frothingham
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
Tel.: (212) 506-2500
Fax: (212) 849-5895
jmancini@mayerbrown.com
jebin@mayerbrown.com
aaviki@mayerbrown.com
mwheelerfrothingham@mayerbrown.com
– and –

/s/ Scott H. Angstreich
Scott H. Angstreich
Leslie V. Pope
Julius P. Taranto
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Tel.: (202) 326-7900
Fax: (202) 326-7999
sangstreich@kellogghansen.com
lpope@kellogghansen.com
jtaranto@kellogghansen.com

Counsel for Amazon.com Services LLC

Andrew M. Gass
Joseph R. Wetzel
LATHAM & WATKINS LLP
505 Montgomery Street
San Francisco, California 94111
Tel.: (415) 391-0600
Fax: (415) 395-8095
andrew.gass@lw.com
joe.wetzel@lw.com

– and –

Allison L. Stillman
Samir Deger-Sen
LATHAM & WATKINS LLP
885 Third Avenue
New York, NY 10022
Tel.: (212) 906-1200
Fax: (212) 751-4864
alli.stillman@lw.com
samir.deger-sen@lw.com

Counsel for Spotify USA Inc.

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.

In re **DETERMINATION OF ROYALTY RATES AND TERMS FOR MAKING AND DISTRIBUTING PHONORECORDS (Phonorecords III)**	**Docket No. 16-CRB-0003-PR (2018-2022) (Remand)**

DECLARATION AND CERTIFICATION OF AARON J. CURTIS REGARDING RESTRICTED PROTECTED MATERIAL

(On behalf of Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc.)

1. I am counsel for Pandora Media, LLC in the above-captioned case. I respectfully submit this declaration and certification pursuant to the terms of the Protective Order issued July 27, 2016 (the "Protective Order"). I have prepared this declaration after consultation with counsel for Amazon.com Services LLC, Google LLC, and Spotify USA Inc. (collectively, with Pandora Media, LLC, the "Services"), and am authorized to submit this declaration on their behalf.

2. I have reviewed the Services' Joint Rebuttal Brief Addressing the Judges' Working Proposal (the "Rebuttal Brief"). Portions of the Rebuttal Brief contain information that the Participants have designated as "Restricted" under the Protective Order (the "Protected Material"). The Protected Material is shaded in grey highlight in the restricted e-filing of the Rebuttal Brief, and is fully redacted in the public e-filing of the Rebuttal Brief.

3. The Protected Material includes testimony and legal argument involving (a) contracts and contractual terms (including the negotiation thereof) that are not available to the public, highly competitively sensitive and, at times, subject to express confidentiality provisions

with third parties; and (b) highly confidential internal business information, financial projections, financial data, negotiation correspondence, and competitive strategies that are proprietary, not available to the public, and commercially sensitive.

4. If this contractual, commercial, or financial information were to become public, it would place the Services at a commercial and competitive disadvantage, unfairly advantage other parties to the detriment of the Services, and jeopardize their business interests. Information related to confidential contracts or relationships with third-party content providers could be used by the Services' competitors, or by other content providers, to formulate rival bids, bid up Service payments, or otherwise unfairly jeopardize the Services' commercial and competitive interests.

5. The contractual, commercial, and financial information described in the paragraphs above must be treated as Restricted Protected Material in order to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling the Services to provide the Copyright Royalty Judges with the most complete record possible on which to base their determination in this proceeding.

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information, and belief, the foregoing is true and correct.

Dated: February 24, 2022
New York, N.Y.

/s/ *Aaron J. Curtis*
Aaron J. Curtis (N.Y. Bar No. 5332903)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, N.Y. 10153
Tel.: (212) 310-8000
Fax: (212) 310-8007
aaron.curtis@weil.com

Counsel for Pandora Media, LLC

Proof of Delivery

I hereby certify that on Thursday, February 24, 2022, I provided a true and correct copy of the Services' Joint Rebuttal Brief Addressing the Judges' Working Proposal (PUBLIC VERSION) to the following:

Nashville Songwriters Association International, represented by Benjamin K Semel, served via ESERVICE at Bsemel@pryorcashman.com

Johnson, George, represented by George D Johnson, served via ESERVICE at george@georgejohnson.com

National Music Publishers' Association (NMPA) et al, represented by Benjamin Semel, served via ESERVICE at Bsemel@pryorcashman.com

Signed: /s/ Todd Larson